

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN E. LIPPL,)	
)	
Plaintiff,)	Civil Action No.
)	
vs.)	
)	
U.S. DEPARTMENT OF THE NAVY, The)	
Pentagon, Washington, D.C. 20350)	
)	
Defendant.)	
)	<i>Electronically Filed</i>
)	

COMPLAINT FOR INJUNCTIVE RELIEF

COMES NOW, Plaintiff, John E. Lippl, by and through his attorneys, Murtagh & Hobaugh, John W. Murtagh, Jr., Adam K. Hobaugh, and John E. Lippl, and files this, his COMPLAINT FOR INJUNCTIVE RELIEF, averring as follows:

Parties

1. Plaintiff John Lippl is an adult individual residing in Allegheny County, Pennsylvania, 15228.

2. The Defendant, U.S. Department of the Navy ("The Navy"), is a component of the Department of Defense. The Navy is an agency within the meaning of 5 U.S.C. § 552(f).

Jurisdiction and Venue

3. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, and the Administrative Procedure Act, 5 U.S.C. § 701 et seq., for injunctive and other appropriate relief,

and seeking the release of agency records requested by plaintiff John E. Lippl ("Plaintiff") from defendant the U.S. Department of the Navy ("Defendant" or the "Navy").

4. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B), (6)(E)(iii).

5. This court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 701 *et seq.*

6. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Factual Allegations

7. Plaintiff, a Lieutenant Commander in the Naval Reserve, was injured while mobilized to active duty for service in Iraq.

8. Following demobilization, the Navy authorized Line of Duty ("LOD") benefits for Plaintiff so that his service related injuries could be treated and Incapacitation Benefits paid to compensate the civilian income lost due to his treatment.

9. By letter dated March 23, 2011 (the "FOIA Request") to LT Michael F. D'Angelo, the Commanding Officer of Navy Operational Support Center Ebensburg, PA (a DON Activity), Plaintiff requested the Navy provide:

[A]ll materials related to my LOD claim; all materials related to my request(s) for Incapacitation Benefits; and all materials related to the approval and/or denial of any portion of my LOD claim or any portion of my request(s) for Incapacitation Benefits. My request includes, but is not necessarily limited to:

1. Copies of all emails, notes, calculations, summaries, memos, letters or documents of any kind which were prepared by you, CDR Thornton, or any past or present member of your staff.
2. Copies of all emails, notes, calculations, summaries, memos, letters or documents of any kind which were received by you, CDR Thornton, or any past or present member of your staff.
3. This request specifically includes emails, notes, calculations, summaries, memos, letters or documents of any kind used to evaluate my request(s) for

Incapacitation Benefits and any emails, notes, calculations, summaries, memos, letters or documents of any kind denying such benefits.

4. Although this request does not seek copies of the request(s) for Incapacitation Benefits that I provided to you, it does seek copies of any of those materials upon which notes were made.

10. Navy Operational Support Center Ebensburg, PA is a “DON Activity” as defined by Defendant’s own regulation promulgated under the FOIA, SECNAVINST 5720.42F

11. The FOIA request was transmitted to the Navy via email and U.S. Certified Mail.

12. The emailed FOIA Request was received by the Navy on March 23, 2011.

13. The mailed FOIA Request was received by the Navy on March 24, 2011.

14. The Navy, via LT Michael F. D’Angelo, confirmed receipt via email dated March 23, 2011.

15. Subsequently, the Navy, through LT Michael F. D’Angelo, promised Plaintiff a response within ten (10) days.

16. To date, the Navy has failed to respond to Plaintiff’s FOIA Request.

17. Plaintiff has exhausted all administrative remedies with respect to this request.

18. On December 13, 2011, Plaintiff made a request pursuant to the Privacy Act and the FOIA, respectively, for:

All documents and/or electronic entries generated and/or possessed by NOSC Ebensburg regarding John E. Lippl and which concern or relate to the requirements of the Navy Physical Readiness Program as defined by OPNAV INSTRUCTION 6110.1J or any predecessor instruction.

And

Any email generated and/or received by NOSC Ebensburg after March 23, 2011, which concerns or relates to John E. Lippl.

19. As of the date of this filing, Plaintiff has not received a response to this request.

20. Plaintiff has exhausted the applicable administrative remedies with respect to this request.

21. On or about January 3, 2012 Plaintiff submitted a FOIA request to LT Michael F. D'Angelo, USN, stating:

Consider this my Freedom of Information Act request for:

1. The NOSC Ebensburg serialized letter log reflecting all log entries made between October 1, 2011 and December 31, 2012; and
2. The NOSC Ebensburg serialized letter log reflecting all log entries from the letter bearing Ser N00/160 through the letter bearing Ser N00/185.

22. As of the date of this filing, Plaintiff has not received a response to this request.

23. Plaintiff has exhausted all administrative remedies with respect to this request.

24. On or about April 15, 2012, Plaintiff submitted another FOIA request to LT Michael F. D'Angelo, USN, stating in pertinent part:

Kindly consider this letter my request, pursuant to the Freedom of Information Act, for all emails and/or communications between NOSC Ebensburg and/or NOSC Pittsburgh and/or CAPT Michael Frac, MD referring or relating to any of the matters referenced in the letters dated 04 April 12, described above.

25. As of the date of this filing, Plaintiff has not received a respond to this request.

26. Plaintiff has exhausted all administrative remedies with respect to this request.

27. The Navy has wrongfully withheld all of the requested records from Plaintiff.

Count I Violation of the FOIA – Failure to Respond to Request

28. The Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 27 as if the same were fully set forth herein and made a constituent part hereof.

29. Defendant's failure to timely respond to Plaintiff's multiple requests violates the FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the Defendant's own regulation promulgated under the Act, SECNAVINST 5720.42F.

30. Defendant's repeated failures to respond are arbitrary, capricious, an abuse of discretion, not in accordance with law and with observance of procedure required by law, all in violation of the FOIA.

31. Plaintiff has a right of access to the requested information under the law and there is no legal basis for the Defendant's denial of such access.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court:

- (a) Order defendant to provide access to all of the requested documents;
- (b) Issue a permanent injunction directing the Navy to disclose to the Plaintiff all wrongfully withheld documents and to provide copies to Plaintiff;
- (c) Issue a written finding, pursuant to 5 U.S.C. § 552(a)(4)(F), that the circumstances surrounding the withholding raise questions whether Navy personnel, specifically including, but not limited to, LT Michael F. D'Angelo, acted arbitrarily or capriciously with respect to the withholding and refer the matter to the Special Counsel to determine whether disciplinary action is warranted against the officer or employee, specifically including, but not limited to, LT Michael F. D'Angelo, who was primarily responsible for the withholding;
- (d) Expedite this proceeding as provided for in 28 U.S.C. 1657;
- (e) Award plaintiff costs and reasonable attorneys' fees in this action, as provided in 5 U.S.C. 552(a)(4)(E); and
- (f) Grant such other and further relief as may deem just and proper, including, but not limited to, reasonable attorneys' fees and costs of suit.

COUNT II - Violation of APA – Failure to Respond to Request

32. The Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 31 as if the same were fully set forth herein and made a constituent part hereof.

33. Defendant's failure to timely respond to Plaintiff's FOIA Requests constitutes agency action unlawfully withheld and unreasonably delayed, in violation of the AP, 5 U.S.C. § 701 *et seq.*.

34. Defendant's repeated failures to respond are arbitrary, capricious, an abuse of discretion, not in accordance with law and with observance of procedure required by law, all in violation of the APA.

35. Plaintiff has a right of access to the requested information under the law and there is no legal basis for the Defendant's denial of such access.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court:

- (d) Order defendant to provide access to the requested documents;
- (e) Issue a permanent injunction directing the Navy to disclose to the Plaintiff all wrongfully withheld documents and to provide copies to Plaintiff;
- (f) Issue a written finding, pursuant to 5 U.S.C. § 552(a)(4)(F), that the circumstances surrounding the withholding raise questions whether Navy personnel, specifically including, but not limited to, LT Michael F. D'Angelo, acted arbitrarily or capriciously with respect to the withholding and refer the matter to the Special Counsel to determine whether disciplinary action is warranted against the officer or employee, specifically including, but not limited to, LT Michael F. D'Angelo, who was primarily responsible for the withholding;
- (d) Expedite this proceeding as provided for in 28 U.S.C. 1657;
- (e) Award plaintiff costs and reasonable attorneys' fees in this action, as provided in 5 U.S.C. 552(a)(4)(E); and
- (f) Grant such other and further relief as may deem just and proper, including, but not limited to, reasonable attorneys' fees and costs of suit.

Respectfully submitted,

s/Adam K. Hobaugh
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